



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Orbit Advanced Technologies, Inc.

File: B-275046

Date: December 10, 1996

Aryeh Trabelsi for the protester.

Gregory H. Petkoff, Esq., John E. Lariccia, Esq., and Ricke D. Hamilton, Esq.,
Department of the Air Force, for the agency.

David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest to the General Accounting Office (GAO) will not be considered where it is preceded by an initial agency-level protest that was not timely filed within 14-day time period established by applicable Federal Acquisition Regulation provisions notwithstanding that protest was filed within 10 days of written debriefing; under Bid Protest Regulations, § 21.2(a)(3), 61 Fed. Reg. 39039, 39043 (1996) (to be codified at 4 C.F.R. § 21.2(a)(3)), where the contracting agency imposes a more stringent time period for filing than the time limits for filing a protest with GAO, the agency's time for filing will control.

DECISION

Orbit Advanced Technologies, Inc. protests the Department of the Air Force's rejection of its proposal as unacceptable under request for proposals No. F42650-96-R-3320, for a near-field antenna measurement system.

We dismiss the protest because the initial protest to the agency was not timely filed.

By letter dated June 14, 1996, the Air Force advised Orbit that its "proposal has been found to be unacceptable in that it fails to conform to the essential requirements of the Statement of Work" (SOW). Specifically, Orbit was advised that its proposed antenna measurement system failed to conform with paragraph 3.2.1.5.1 of the SOW--which required that the system's "mechanical structure shall be capable of being mounted onto a Government designed and fabricated structure that is capable of being tilted up to 47 degrees from vertical"--because the system was "too massive to attach to one of the Government's support structures." In a letter dated June 26, the Air Force further explained to Orbit that its proposal was unacceptable because it included a fixed height support structure incorporating a tilt mechanism in its scanner design and the support structure was

too tall to fit into any of the buildings being considered to house the system; the agency advised that the SOW had specified a government-designed tilt structure--rather than a contractor-furnished one--specifically to allow the system to be positioned at different heights to scan antennas mounted on various vehicles.

Although the agency's June 26 letter afforded Orbit "an additional opportunity to provide an acceptable technical proposal," Orbit's subsequent revised proposal included suggestions such as digging a pit in the agency's test building or removing antennas from the vehicles for testing as a means of overcoming the agency's size concerns, but apparently did not offer to eliminate Orbit's built-in tilt mechanism. As a result, the agency viewed the proposal as unacceptable; Orbit was advised by letter dated July 25 why its proposed revisions were unsatisfactory and of the agency's overall determination that its proposal was "not technically acceptable, nor capable of being made technically acceptable." When Orbit then questioned specific elements of the agency's determination of unacceptability, and raised the possibility of filing a protest, the Air Force responded on August 6 that the evaluators had "once again thoroughly reviewed your technical submissions in an effort to keep you in the competitive arena. However, as you will see from the attached final determinations and findings, this is not possible." On August 8, Orbit requested "a formal debriefing" in accordance with Federal Acquisition Regulation (FAR) § 15.1004. A written debriefing was furnished by letter dated August 30, and on September 6 Orbit filed an agency-level protest challenging the determination of unacceptability. Upon learning on September 30 that its agency-level protest had been denied, Orbit filed this protest with our Office (on October 10) again challenging the determination of unacceptability.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, a protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier, except that in the case of protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required, a protest filed not later than 10 days after the date on which the debriefing is held will be timely. Bid Protest Regulations, § 21.2(a)(2), 61 Fed. Reg. 39039, 39043 (1996) (to be codified at 4 C.F.R. § 21.2(a)(2)). Further, our Regulations provide that a matter initially protested to the agency will be considered only if the initial protest to the agency was filed within the time limits for filing a protest with our Office, unless the contracting agency imposes a more stringent time for filing, in which case the agency's time for filing will control. Section 21.2(a)(3), 61 Fed. Reg. supra (to be codified at 4 C.F.R. § 21.2(a)(3)); Tandy Constr., Inc., B-238619, Feb. 22, 1990, 90-1 CPD ¶ 206.

These timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without

unduly disrupting or delaying the procurement process. Air Inc.--Request for Recon., B-238220.2, Jan. 29, 1990, 90-1 CPD ¶ 129. In order to prevent the timeliness rules from becoming meaningless, exceptions are strictly construed and rarely used. Id.

The record establishes that Orbit's initial agency-level protest was untimely; a protest to the contracting agency based on other than alleged improprieties in a solicitation must be filed not later than 14 calendar days after the basis for protest was known or should have been known, whichever is earlier. FAR §§ 33.101 and 33.103. The Air Force advised Orbit by letter dated July 25 of the basis for its determination that Orbit's proposal was "not technically acceptable, nor capable of being made technically acceptable," and unequivocally reaffirmed that view in its August 6 letter, but Orbit did not file its agency-level protest until September 6, more than 14 days later. Orbit notes that its protest was filed 10 days after the written August 30 debriefing, and that our Bid Protest Regulations provide for consideration of protests challenging a procurement conducted on the basis of competitive proposals which are filed not later than 10 days after a required debriefing is held. Under the facts here, however, the applicable FAR provisions establish a more stringent time period--14 days after the basis for protest was known with no consideration given to the time of a debriefing--for filing an agency-level protest, and thus it is the FAR timeliness provisions which control.

While Orbit claims that the contracting officer agreed during an August 6 telephone conference call to hold a "Technical Interchange Meeting" and explains that it "felt that direct technical discussions with the Government would lead to our being found technically acceptable," there is no indication in the record that the determination of unacceptability and consequent elimination of its proposal from further consideration had been suspended and that Orbit would be afforded the opportunity again (as it was after the initial June 14 determination of unacceptability) to revise its proposal. Rather, the record indicates that Orbit itself recognized that its proposal remained unacceptable even after the August 6 telephone conference; according to the protester, "[b]ased on the positive content of the discussion Orbit made a decision not to propose a protest as a remedy to our situation of being found technically unacceptable." Further, the fact that Orbit requested a formal debriefing on August 8 confirms that it understood that its proposal was no longer under consideration for this procurement. While Orbit may have contemplated pursuing the matter further with the agency in the hopes of subsequently convincing the agency to alter its position, this in no way

suspended the applicable timeliness requirement. See generally Tandy Constr., Inc., supra. Thus, Orbit's failure to file its agency-level protest within 14 days after the basis for protest was known renders that protest untimely, and we will not consider its subsequent protest to our Office.

The protest is dismissed.

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